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THE UNITED STATES, APPELLANT,
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THE RIO GRANDE DAM AND IRRIGATION COMPANY AND THE RIO GRANDE IRRIGATION AND LAND COMPANY, LIMITED. } No. 215.

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STATEMENT.

This is an appeal from the final decree of the supreme court of New Mexico adjudging the bill of complaint to be without equity, and dissolving the preliminary injunction which was granted at the time of filing the bill.

On the 24th of May, 1897, the United States, by its Attorney-General, filed its bill of complaint in the district court of the third judicial district of the Territory of New Mexico against the Rio Grande Dam and Irrigation Company, a corporation organized under the laws of New Mexico, praying that the defendant might be

restrained from beginning, building, creating, constructing, or maintaining any obstruction to the navigability of the Rio Grande River in the Territory of New Mexico by means of a dam, breakwater, or other obstruction. The bill set forth that the Rio Grande Dam and Irrigation Company had for the objects of its incorporation the construction and maintenance of dams and reservoirs, and canals, ditches, and pipe lines to the extent of from 50 to 5,000 miles in the Territory of New Mexico, and for the purpose of supplying water to be accumulated in practically illimitable quantity in said dams and reservoirs; that it was the object and purpose of said defendant company to construct and build dams across the Rio Grande River at certain points in New Mexico as might be necessary to carry out the objects and purposes of said incorporation, and particularly that the defendant was about to commence and create an unlawful obstruction in said river by constructing a dam in and across the river at a point called Elephant Butte, in the Territory of New Mexico, and in the third judicial district thereof, the same being 125 miles north and slightly west of the city of El Paso, in the State of Texas, for the purpose of storing water in large quantities to carry out the purposes of the said incorporation.

The bill alleged that the Rio Grande River, from and including the site of the proposed dam, had been used to float logs for commercial and business purposes, and for affording a means for commercial traffic within and between the Territory of New Mexico and the State of Texas and the Republic of New Mexico; that the Rio Grande River is a navigable stream, and used as such in

interstate commerce from the mouth of the Conchos River, in the Republic of Mexico, to the city of El Paso, a distance of 200 miles, and that the navigability of the Rio Grande at El Paso has been recognized and acknowledged by the Congress of the United States and the Secretary of War.

The bill further alleged that the proposed dam would be such an one as would check the flow of the river at Elephant Butte entirely for a greater portion if not the entire year, and impound it, and that such distribution of the waters of the river from said proposed dam would practically destroy the river as a stream for many miles below said point and diminish the volume of water below the dam *so as to materially affect the navigability of the Rio Grande River and impair navigation and commerce throughout its entire course from said proposed dam at Elephant Butte to the Gulf of Mexico.*

The bill further charges that the defendant company by means of the said dams *proposes to create the largest artificial lake in the world, to obtain control of the entire flow of the Rio Grande River in the southern part of New Mexico, and to secure a monopoly of all the waters suitable for irrigation in said Territory contiguous to the said river below the site of said proposed dam.* The bill alleges that said proposed building and construction are without the permission, authority, or approval of the Secretary of War, and contrary to the provisions of the act of Congress of September 19, 1890 (26 Stats., 454, sec. 10), and of section 3 of the act of Congress approved July 13, 1892 (27 Stats., 110).

Upon filing said bill, the court issued a temporary writ of injunction as prayed, and fixed the date for hearing. Subsequently, and before any hearing was had, the complainant filed an amended bill alleging, among other things, that the Rio Grande River was navigable and had been navigated by steamboats for 350 miles from its mouth, and was susceptible of navigation up to La Joya, in the Territory of New Mexico, about 150 miles above Elephant Butte; and that the river, from some rapids located about 150 miles below El Paso to said town of La Joya, "has at different times been used for the purposes of floating and transporting rafts, logs, and poles, and that said portion of said stream is susceptible of being used and navigated for commercial purposes." The amended complaint also alleges, in substance, that the impounding of the waters at Elephant Butte, as contemplated by the defendants, would so deplete the flow of the water through the channel of said river "as to seriously obstruct the navigable capacity of the same throughout its entire course from said point at Elephant Butte to its mouth." It also sets out the provision in the treaty between the United States and the Republic of Mexico (known as the treaty of Guadeloupe Hidalgo) declaring that the Rio Grande, from the southern boundary of the Territory of New Mexico to its mouth, shall be free and common to the vessels and citizens of both countries, and that neither country shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of said right of free navigation, "and that neither party of said treaty has consented or authorized the construction of said dam."

By this amended bill another defendant, namely, the Rio Grande Irrigation and Land Company, Limited, a corporation organized under the laws of Great Britain, and having its principal office in London, was brought in as defendant, it being alleged by the amended bill that the last-named defendant was organized as an adjunct and agent of the original defendant for the purpose of securing capital for promoting the construction of its works, and that the original defendant, the Dam and Irrigation Company, had entered into a contract or agreement for the conveyance to its codefendant, the English company, of all the rights in and to said dams, etc., and that the said English company was pretending and attempting to possess and exercise all the rights, privileges, and franchises of the original defendant, and intended to erect and construct a dam, reservoir, etc., of the same nature and for the same purpose as set out in the original bill of complaint.

The amended bill expressly alleged that the impounding of the water of the river by the construction of a dam and reservoir at Elephant Butte, and the diversion of the waters and the use of the same for the purposes of irrigation, as intended by the defendants, would so deplete and prevent the flow of water through the channel of the river below the dam, when so constructed, as to seriously obstruct the navigable capacity of the river through its entire course from Elephant Butte to its mouth.

The prayer of the amended bill was substantially the same as that of the original bill, except that injunction was asked against both defendants.

To this amended bill the defendants filed two pleas, and also a joint and separate answer. The answer denies that the Rio Grande is a navigable river within the limits of the Territory of New Mexico. By their pleas they justify their right to construct the dam and impound and divert the waters under certain acts of Congress of October 2, 1888, August 30, 1890, and subsequent similar legislation, whereby it has secured, by compliance with the land laws of the United States, certain dam and reservoir sites formerly reserved, but later thrown open for acquisition.

The case was heard on motion to dissolve the injunction. No evidence seems to have been taken in the case, but a large number of public documents in the shape of maps, reports of exploring and surveying expeditions, and reports of special officers, were submitted to and read and considered by the court for the purpose of deciding the question of the navigability of the river *at the point in question.*

DECISION OF THE COURT BELOW.

The conclusion of the court was that the Rio Grande is not a navigable river above El Paso, and that the waters thereof are local waters under local control, and that their interruption and diversion is not a violation of any law of the United States or any treaty; that the bill of complaint as amended is without equity, and the temporary injunction should be dissolved.

The decision of the district court of the third judicial district was subsequently affirmed by the supreme court

of the Territory, from whose decree of affirmance this appeal is taken.

Practically, therefore, the question arises upon the facts stated in the bill of complaint, the cause having been heard substantially as though the defendants had demurred to the bill.

The acts of Congress referred to in the bill of complaint and in this argument, and the treaty with Mexico, are printed in the appendix to this brief.

On behalf of the United States, the following propositions will be maintained:

I.

The rule of prior appropriation of waters, the statutes of the Pacific States and Territories, and the acts of Congress of 1866, and the other statutes relating to the disposition and control of the public lands, have reference only to the proprietary rights of riparian owners, and do not have, and were not intended to have, any effect whatever upon the right of control which the United States exercise in their character of sovereign over navigable waters.

II.

Although a State may hold the title to lands under navigable waters within its limits, its title is different in character from that which the State holds in lands intended for sale. Such title is held in trust for all the people, and the sovereignty and control of the State can not be abdicated.

The same limitation applies to the National Government with respect to its power and control over navigation.

III.

The various acts of Congress relating to the use of waters in the reclamation of arid lands, and to the settlement and appropriation of Government lands, indicate no purpose whatever on the part of Congress to part with any power or control or rights of sovereignty or interest in the navigable waters of the United States.

IV.

The defendants propose to acquire the exclusive control of the Rio Grande at Elephant Butte, not for present and actual use, but for future and speculative profit, thereby vesting a monopoly of the water of the river in a single individual. Such a monopoly can not be acquired under the doctrine of prior appropriation, and is unlawful.

V.

The court erred in holding that the Rio Grande is not a navigable river above El Paso.

VI.

The threatened acts of defendants are within the prohibition of the act of 1890 (26 Stat., 454).

VII.

The defendants' proposed action is also forbidden by the act of 1892 (27 Stat., 110).

VIII.

Irrespective of the statutes of 1890 and 1892, the Federal courts have authority and jurisdiction to restrain by injunction, at the suit of the United States, the threatened injuries which defendants are preparing to commit to navigable waters.

IX.

If the proposed works of defendants, by damming the Rio Grande at Elephant Butte and diverting the waters of the river, will injuriously affect the navigability of the stream in its navigable part, it is immaterial that the works are located at a point where it is not navigable.

X.

The threatened acts of defendants, by destroying the navigability of the Rio Grande, will be constructively a violation by the United States of its treaty obligations with Mexico, and the United States are therefore bound to prevent such injuries.

XI.

The relative importance of the navigation of the Rio Grande and the irrigation of arid lands in New Mexico can not be taken into consideration in determining the questions in this case.

POINT I.

The rule of prior appropriation of waters, the statutes of the Pacific States and Territories, and the acts of Congress of 1866, and the other statutes relating to the disposition and control of the public lands, have reference only to the proprietary rights of riparian owners, and do not have, and were not intended to have, any effect whatever upon the right of control which the United States exercises in its character of sovereign over navigable waters.

THE COMMON LAW DOCTRINE OF RIPARIAN RIGHTS.

At common law the right of every riparian proprietor to the use of the stream is an incident to the ownership of the land bordering upon the stream, and arises *ex jure naturæ*. The right exists whether it is exercised or not, and the riparian proprietor may begin to exercise it when he will. It does not depend upon occupancy and is not limited by the prior occupation of others not amounting to an adverse enjoyment by prescription; but the rights of the different proprietors being equal, and each being entitled to the reasonable use of the same for any lawful purpose, it is wholly immaterial who is first in time. It is the right of the riparian owner at common law to have the stream flow in its natural channel without restraint, diversion, or pollution. If water is diverted from the stream by one riparian owner for any purpose except domestic uses, it must be returned again into the stream before reaching the lands of the riparian owner below.

THE DOCTRINE OF PRIOR APPROPRIATION.

In the Pacific States and Territories the common-law rule upon this subject is modified, owing to the peculiar

condition and interest of the settlers and miners upon public lands, and the right to running water exists without private ownership of the soil, upon the ground of prior location upon the land or prior appropriation of the water.

By this doctrine, as between persons who claim the water of a stream flowing through the public lands merely by the prior appropriation of the water itself, or by a prior location upon the land he has the best right who is first in time. The first appropriator is entitled to use and enjoy the water to the full extent of his original appropriation; to have its quantity unimpaired, so as not to defeat the purpose of such appropriation, and to remove obstructions from the natural channel. He may apply the water to any beneficial purpose without any obligation to return it to the stream from which it was taken, or to preserve its purity or quantity. He is equally entitled to have his right unimpaired by subsequent locators above as well as below him. (*Gould on Waters*, section 229; *Pomeroy on Riparian Rights*, par. 12, etc.)

The origin of this peculiar doctrine of prior appropriation is interestingly stated by Mr. Justice Field in the case of *Jennison* v. *Kirk* (98 U. S., 453, 457):

> The discovery of gold in California was followed, as is well known, by an immense immigration into the State, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them

further than that they were situated in the Sierra Nevada Mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches, and canyons, and probing the earth in all directions for the precious metals. Wherever they went they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as respects mining, upon the public lands in the State. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the Government, he was regarded as the original owner, from whom title was to be traced. But the mines could not be worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities, when

they were not on the banks of a stream or lake, became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes was recognized as having, to the extent of actual use, the better right.

The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were consequently carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through canyons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years—from 1848 to 1866—the regulations and customs of miners, as enforced and molded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands. Until 1866, no legislation was had looking to a sale of the mineral lands. The policy of the country had previously been, as shown by the legislation of Congress, to exempt such lands from sale. In that year the act, the ninth section of which we have quoted, was passed.

The custom thus originating was soon approved by the courts, and the doctrine became and still is settled in California and other Pacific States and Territories, in opposition to the common law, that a permanent right of property in the water of streams or inland lakes, which wholly ran through or were situate upon the public lands of the United States, may be acquired for mining purposes by mere prior appropriation; that a prior appropriator may thus acquire the right to divert, use, and consume a quantity of water from the natural flow or condition of such streams or lakes which may be necessary for the purposes of his mining operations; and that he becomes, so far as he has thus made an actual prior appropriation, the owner of the water as against all the world, except the United States Government. This doctrine, applied at first to the operations of mining, has been extended to all other beneficial purposes for which water may be essential, including irrigation. (*Pomeroy on Riparian Rights, par. 15.*)

ACT OF 1866.

The right of property in running waters by appropriation thus recognized by the local courts and sanctioned by local legislation acquired no validity against the Federal Government, or its grantee, until the passage of the act of Congress of July 26, 1866 (14 Stat., 253).

Section 9 of that act is relied upon in this case as conferring upon the defendant the right to divert the waters of the Rio Grande River in the manner stated in the bill of complaint as against the Government of the United

States. It is necessary, therefore, to give some consideration to the proper meaning and construction of this section.

As enacted, the section reads as follows:

> That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however,* That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

The section above quoted was reenacted in the Revised Statutes as section 2339.

The purpose and meaning of this section are declared by Mr. Justice Field in the case of *Jennison* v. *Kirk* (98 U. S., 460), as follows:

> It was for the purpose of securing rights to water, and rights of way over the public lands to convey it, which were thus recognized, that the ninth section was adopted, and not to grant rights of way where they were not previously recognized by the customary law of miners. The section purported, in its first clause, only to protect rights to the use of water for mining, manufacturing, or other beneficial purposes, acquired by priority of possession, when

recognized by the local customs, laws, and decisions of the courts; and the second clause, declaring that the right of way for the construction of ditches and canals to carry water for those purposes "is acknowledged and confirmed," can not be construed as conferring a right of way independent of such customary law, but only as acknowledging and confirming such right as that law gave. The proviso to the section conferred no additional rights upon the owners of ditches subsequently constructed; it simply rendered them liable to parties on the public domain whose possessions might be injured by such construction. In other words, the United States by the section said that whenever rights to the use of water by priority of possession had become vested and were recognized by the local customs, laws, and decisions of the courts, the owners and possessors should be protected in them, and that the right of way for ditches and canals incident to such water rights, being recognized in the same manner, should be "acknowledged and confirmed;" but where ditches subsequently constructed injured by their construction the possessions of others on the public domain, the owners of such ditches should be liable for the injuries sustained. Any other construction would be inconsistent with the general purpose of the act, which, as already stated, was to give the sanction of the Government to possessory rights acquired under the local customs, laws, and decisions of the courts.

In the case of *Broder* v. *Water Co.* (101 U. S., 274), it was held that the act of 1866 merely confirmed to land owners the rights and privileges they had formerly enjoyed by local customs and the decisions of the local courts.

In the case of *Atchison* v. *Peterson* (20 Wall., 507), Mr. Justice Field further explains the reason and extent of this special doctrine, and says:

> This equality of right (at the common law) among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the Government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams. The Government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and Territories, by their customs, usages, and regulations everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories.

Again, he says:

> This doctrine of right by prior appropriation was recognized by the legislation of Congress in 1866. The right to water by prior appropriation, thus recognized and established as the law of miners on

> the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made.

The basis of this modification of the law of waters is a presumed license to the appropriator, the presumption arising out of the acquiescence of the proprietor. Thus it is said:

> From a very early day the courts of this State have considered the United States Government as the owner of running waters on the public lands of the United States, and of their beds. Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the State courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was allowed or licensed by the United States. (*Lux* v. *Haggin*, 10 Pac. Rep., 721; *Conger* v. *Weaver*, 6 Cal., 556, 557.)

From these considerations it is manifest that the act of 1866, section 9 (Rev. Stat., 2339), *did nothing more than to recognize by Congressional enactment a construction which the courts of the Pacific States and Territories had placed upon the action or conduct of the Government under the denomination of a license. The statute turned into a positive consent that which before was only an implied consent.*

In *Atchison* v. *Peterson* (20 Wall., 513), Mr. Justice Field says:

> This doctrine of right by prior appropriation was recognized by the legislation of Congress in 1866.

See also *Basey* v. *Gallagher* (20 Wall., 670), where the doctrine as to appropriation for mining purposes was applied by this court to all other beneficial purposes for which water is essential.

In *Pollard's Lessee* v. *Hagan* (3 Howard, 212, 223), Mr. Justice McKinley, speaking for the Supreme Court, says:

> When Alabama was admitted into the Union on an equal footing with the original States she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in the cases in which it is expressly granted.

He further says, on page 230:

> This right of eminent domain over the shores and soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to

transfer to a citizen the title to the shores and the soils under the navigable waters would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty and deprive the States of the power to exercise a numerous and important class of police powers. But in the hands of the States, this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, "and the laws which shall be made in pursuance thereof."

By the preceding course of reasoning we have arrived at these general conclusions: First, the shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the States respectively. Secondly, the new States have the same rights, sovereignty, and jurisdiction over this subject as the original States.

The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted

away during the period of Territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community. (*Shively* v. *Bowlby*, 152 U. S., 1, 49, 50.)

Congress has the paramount right to control the navigable waters of the United States, whether tide waters, the lakes, or the rivers, so far as may be necessary for the regulation of commerce with foreign nations and among the States. (*Illinois Central R. R. Co.* v. *Illinois*, 146 U. S., 387.)

POINT II.

Although a State may hold the title to lands under navigable waters within its limits, its title is different in character from that which the State holds in lands intended for sale. Such title is held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. Such sovereignty and control can not be abdicated by a State.

Such abdication is not consistent with the exercise of that trust which requires the government of the State to

preserve such waters for the use of the public. (*Illinois Central R. R. Co.* v. *Illinois*, 146 U. S., 452, 453.)

The same limitation that applies to a State applies to the National Government. Congress can no more abdicate its trust over property in which the whole people are interested, like navigable waters, so as to leave them under the entire use and control of private parties, except in the instances of parcels for the improvement of navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its other sovereign powers in the administration of government and the preservation of the peace. (*Illinois Central R. R. Co.* v. *Illinois*, 146 U. S., 453.)

Mr. Justice Field, further, in the case above cited, on page 455, says:

> The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and can not be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.

See also the opinion of Mr. Justice Bradley in the case of *Stockton* v. *Baltimore and New York Railroad Company* (32 Fed. Rep., 9, 19, 20), quoted and adopted by Mr. Justice Field in the *Illinois Central Railroad Case* (146 U. S., 456, 457), as follows:

> It is insisted that the property of the State in lands under its navigable waters is private property,

and comes strictly within the constitutional provision. It is significantly asked, Can the United States take the State house at Trenton, and the surrounding grounds belonging to the State, and appropriate them to the purposes of a railroad depot, or to any other use of the General Government, without compensation? We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title or ownership by which the State holds the State house is quite different from that by which it holds the land under the navigable waters in and around its territory. The information rightly states that prior to the Revolution the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the King of Great Britain as part of the *jura regalia* of the Crown, and devolved to the State by right of conquest. The information does not state, however, what is equally true, that after the conquest the said lands were held by the State, as they were by the King, in trust for the public uses of navigation and fishery, and the erection thereon of wharves, piers, lighthouses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris;* in other words, they were held for the use of the people at large. It is true, that to utilize the fisheries, especially those of shellfish, it was necessary to parcel them out to particular operators and employ the rent or consideration for the benefit of the whole people, but this did not alter the character of the title. The land remained subject to all other public uses as before, especially to those of navigation and commerce, which are always paramount to those of public fisheries. It is also true, that portions of the submerged shoals and flats,

> which really interfered with navigation and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose. But neither did these dispositions of useless parts affect the character of the title to the remainder.

The court below held that the United States, by the act of 1866, had surrendered its riparian rights, and assumed that such surrender carried with it a surrender of its control and sovereignty over navigable waters in so far as its recognition of the right of prior appropriation allowed a riparian owner, above the head of navigation, to divert the waters of the stream, even though navigation might thereby be entirely destroyed.

It is evident, from the considerations above expressed, that Congress could not thus part with its control over navigable waters and give a valid consent to the destruction of this public right. Nothing in the legislation of Congress indicates that it had any such intention. On the contrary, it is evident that all its legislation was intended to refer to its proprietary right in public lands, and so far as its legislation affected the waters of lakes, rivers, etc., it was intended to apply to waters which were not navigable, or to such use thereof as would not affect injuriously the right of navigation.

By the act to provide for the sale of desert lands in certain States and Territories, approved March 3, 1877 (19 Stat., 377), it was made lawful for any citizen to file a declaration that he intends to reclaim a tract of desert land by conducting water upon the same: "*Provided, however,* That the right to the use of water by the person so conducting the same on or to any tract of desert land of

640 acres shall depend upon bona fide prior appropriation, and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands, and *not navigable*, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights."

POINT III.

The different acts of Congress with reference to the use of waters in the reclamation of the arid region are mentioned in the opinion of the supreme court of New Mexico, in this case, on page 7. An examination of these acts and of all the other acts of Congress relating to the settlement and appropriation of Government lands will indicate no purpose whatever on the part of Congress to part with any power or control or right of sovereignty, or interest in the navigable waters of the United States.

It is not denied but what there may be proper use made for purposes of irrigation, mining, etc., of the waters of streams which are navigable at their lower extremity and not at their upper extremity, so as not to interfere with nor injure navigation.

All the acts of Congress and grants and proceedings of the Land Office relating to reservoir sites, etc., will be construed as intended to be consistent with a use which shall not be detrimental to navigation. They are not to be construed as granting a right, which Congress had no power to grant, of impairing or destroying navigation.

"Nothing passes against the King by implication" is a maxim founded on strong grounds of public interest. What a man asserts is his, as against the common right, he should show express title for.

POINT IV.

The defendants propose to acquire the exclusive control of the Rio Grande at Elephant Butte, not for present and actual use, but for future and speculative profit, thereby vesting a monopoly of the water of the river in a single individual. Such a monopoly can not be acquired under the doctrine of prior appropriation, and is unlawful.

Whenever a private person, as preemptor, homestead settler, or other purchaser or grantee, has acquired title from the United States to a tract of the public land bordering upon a stream or lake within a State, any subsequent appropriation of the waters thereof by another party is subject to his prior rights as a riparian proprietor, whatever those rights may be under the municipal law of the State; and, as against such subsequent appropriator, his rights as riparian proprietor are complete. (Pomeroy on Riparian Rights, par. 43, and cases there cited.)

In order to make a valid appropriation of waters upon the public domain, and to obtain an exclusive right to the water thereby, the fundamental doctrine is well settled that the appropriation must be made with a *bona fide* present design or intention of applying the water to some immediately useful or beneficial purpose. (Pomeroy on Riparian Rights, par. 47, and cases there cited.)

The doctrine of prior appropriation arising out of the customs and practices of individual miners in the Pacific settlements affords, historically, a basis upon which to found the proper limitations upon the extent of water which may be appropriated. It is obvious that each person's right was naturally limited by his particular interest, so that it is fair to assume that no one had the right to appropriate more water than was needed for his particular uses. So we find it stated in Pomeroy on Riparian Rights that—

> The system places an obstacle in the way of a prior appropriator's obtaining an exclusive control of the entire stream, no matter how large, and secures the rights of subsequent appropriators of the same stream, by requiring that a valid appropriation shall be made for some beneficial purpose, presently existing or contemplated; and by restricting the amount of water appropriated to the quantity needed for such purpose; and by forbidding any change or enlargement of the purpose which should increase the quantity of water diverted under the prior appropriation, to the injury of subsequent claimants; and by subjecting the prior appropriation to the effects of an abandonment, by which all prior and exclusive rights once obtained would be lost. *By these means a party is, in theory, at least, prohibited from acquiring the exclusive control of a stream, or any part thereof, not for present and actual use, but for future, expected, and speculative profit or advantage. In other words, a party can not obtain the monopoly of a stream in anticipation of its future use and value to miners, farmers, or manufacturers.* (Par. 91.)

In *Basey* v. *Gallagher* (20 Wall., 670, 683), Mr. Justice Field, speaking of this particular right or prior appropriation of water, says:

> This right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, *and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.* See also *Atchison* v. *Peterson* (20 Wall., 507, 514).

The bill of complaint alleges that it is the purpose of the defendant to construct from *50 to 5,000 miles of canals*, ditches, and pipe lines to supply water, for which it proposes to construct dams across the Rio Grande at such points as may be necessary to carry out those objects, and to impound the waters of the river in unlimited quantities in dams and reservoirs and distribute the same through said canals, ditches, and pipe lines.

This is not a use consistent with the rules that obtain governing the right of prior appropriation.

It is the establishment of a speculative monopoly.

The prospectus of the defendant company alleges (Rec., p. 31) that the company by the means of its works will obtain control of the entire flow of the Rio Grande River in southern New Mexico, and in controlling the water the company will, to a great extent, control the irrigable lands. That the remaining land owners must, in order to render their properties of value, concede a large portion of their lands for water rights, or purchase said water rights at the ruling rate from the company. (Rec., p. 32.)

In order to illustrate to the court the preposterous claims of this British corporation, I think it proper to call attention to an extract from a communication to the Secretary of State of the United States from Col. W. J. Engledue, chairman of the Rio Grande Irrigation and Land Company, under date of December 14, 1897, wherein he refers to this pending case, and forwards, as an expression of the views of his company, an address delivered by him at the general meeting of the shareholders on December 3, 1897.

In that address he says:

> The company's titles were legally acquired under the Territorial laws of New Mexico and the Federal laws of the United States, the vendor company's right to impound and appropriate the waters of the Rio Grande having been finally and formally recognized by the late Secretary of the Interior, a member of Mr. Cleveland's Cabinet. Each American State, being a sovereignty within itself, enjoys what is termed State rights or home rule, and the Federal authorities at Washington having formally authorized, under a Cabinet minister's signature, the construction of the company's works, having no power, notwithstanding the terms of the treaties with Mexico, to interfere with our diversion in New Mexico of the waters of the Rio Grande for irrigation purposes.

Further on in the same address occurs the following:

> As your chairman, I have already officially notified the State Department, the Secretary of State, and the Attorney-General of the company's intention to proceed to recover damages from the United States for injury to our works, loss of credit, and

losses sustained through delay consequent upon the Government's injunction, as soon as a proper estimate as to the extent of the injury and losses sustained can be arrived at, and in the correspondence that has passed between the company and the Department of State the company's rights have been valued at between £2,000,000 and £3,000,000 sterling. Manifestly, the most inexpensive and satisfactory way out of the difficulty will be for the United States to subsidize the company as proposed.

POINT V.

The court erred in holding that the Rio Grande River is not a navigable stream above El Paso.

Although Government reports of Army officers, agents of the Interior Department, and specially detailed investigators were read and considered by the court, they were not properly in evidence, and could not lawfully be referred to in determining the equity of complainant's bill.

The bill of complaint alleged as a matter of fact the navigability of the river from a point above Elephant Butte to the mouth. (Rec., p. 17, par. 6.) By the pleadings, issue was joined upon the question of fact as to the navigability of the river at Elephant Butte. That issue was not tried, but the court, taking judicial notice of a disputed fact, decided it on a motion upon which the truth of all complainant's allegations of fact was by the rule of pleading and procedure admitted.

By the common law a river is *prima facie* navigable only so far as the tide ebbs and flows, and in case of doubt the burden of proof is upon those who allege

navigability above that point. But the courts take notice of those characteristics of streams which are matters of general history or common knowledge. (Gould on Waters, sec. 112; *Bowman* v. *Wathen*, 2 McLean, 376.)

> The judges do not assume any private or technical information of the matter, *but they simply recognize the fact as being already sufficiently established.* When such fact is of universal application, it will be judicially noticed generally; but when its operation is absolute within certain limitations, it will only be recognized within the jurisdiction to which the same extends. Thus impressed with absolute verity, such facts may be embraced in instructions to juries without infringing upon their province of determining issues of fact. (Amer. and Eng. Ency., Law, vol. 12, p. 151. Judicial notice. *Brown* v. *Piper*, 91 U. S., 37.)

That this river is navigable for a very considerable distance above its mouth is a notorious fact, not disputed, and is recognized by our treaty with Mexico. But the question here is, How shall the fact of its navigability or otherwise, at the point in question, be determined? Will the court take judicial notice of what is the fact, or is it a question of fact to be determined by proof?

It would seem that the statement in 16 American and English Encyclopædia, Law, page 245, that "Navigable capacity is generally a question of fact, and the burden of proving it is on the party alleging the same; but the courts of some States will take judicial notice of the navigability of streams" fairly states the result of the authorities. And it may be added that the Federal courts sometimes do so also. But what is the distinguishing

criterion by which it may be determined when courts will and when they will not take such notice is not very apparent, and yet would seem to be fairly indicated by the authorities and by general principles.

It would seem both upon principle and upon authority that courts will take judicial notice of such facts only as are certain, not doubtful, uncertain, or susceptible of disproof, and those as to which opinions can not reasonably differ. This is so, because the court assumes to know that they are both true and notorious, which can not be done in case of any uncertainty or doubt. The whole theory upon which judicial notice proceeds is that the fact is not only certainly true, but also that its truth is so notorious that everyone ought to know it; and that a court will not pretend to be ignorant of that which is generally known.

In 12 Am. and Eng. Ency. Law, 151, this is stated in this way:

> The admissibility of those classes of facts which are in their nature official, political, historical, geographical, commercial, judicial, legislative, scientific, or artistic can be *accurately determined;* but, in addition to these, notice will be taken of a wide range of matters of natural occurrence and of those arising in the usual course of life, the recognition of which *depends upon the completeness of their certainty and notoriety.* With regard to such facts, care must be taken that the requisite notoriety exists. This power of judicial notice is to be exercised with caution. Every reasonable doubt upon the subject should be resolved promptly in the negative.

And this is the consensus of the authorities.

In other words, that of which a court will take judicial notice must be certainly true, and notoriously true. And it must be so certainly and notoriously true that courts will not permit proof to the contrary, upon principle. This necessity results from the fact that the court does take judicial notice of the matter; for it would be absurd for a court to say that a matter is so certainly and notoriously true that the court can say, *ex cathedra*, that it is a fact, and at the same time admit proof that it is not a fact. And so are the authorities.

> The primary effect of judicial notice is to dispense with the proof of some fact. To the extent that this is done, the power of the jury, as triers of fact, is limited and circumscribed, and the power of the court to decide upon the existence of a fact, as a matter of law, and by its decision to bind the jury, is correspondingly enlarged. To permit the court to take judicial notice of obvious and familiar facts is equivalent to enunciating a rule of law that such facts are to be considered by the jury as conclusively proved and as obligatory upon them. This view of the matter is confirmed by the constant practice of the courts, in refusing not only to permit the introduction of evidence to prove the fact, but of evidence to disprove its truth as well. (Underhill on Ev., 364.)

Under this rule courts will in a proper case take judicial notice that parts of the Potomac, Mississippi, Hudson, and other large streams are navigable, and yet in most cases, at least, there is a point where each of these streams ceases to be navigable, and the point where courts will refrain from taking judicial notice is the point where navigability ceases to be certain, and so apparent

and notorious that there can be no reasonable doubt or question about it.

Thus, in *Buffalo Pipe Line Co.* v. *N. Y., L. E. & W. R. R. Co.* (10 Abb. N. C., 107), one paragraph in the syllabus says: "Streams of less magnitude, which are in fact navigable for portions of the year, but their capacity is not historical or traditional, and the court can not take judicial notice of their character, but must rely upon evidence to ascertain their capacity and the use which may be made of them."

Because the affirmative existence of facts is easier and better known, more traditional and notorious, a court might well take notice that a large stream was navigable when it would not that a smaller one was not navigable, as in the case last cited. And in *Wood et al.* v. *Fowler et al.* (26 Keen, 682), it is said in the syllabus that "courts will take judicial notice of the navigability of *large* rivers," and in the opinion by Brewer, J., it is said (p. 687):

> Indeed, it would seem absurd to require evidence of that which every man of common information must know. To attempt to prove that the Mississippi or the Missouri is a navigable stream would seem an insult to the intelligence of the court. The presumption of general knowledge weakens as we pass to smaller or less-known streams, and yet, within the limits of any State, the navigability of its *largest* rivers ought to be generally known, and courts may properly assume it to be a matter of general knowledge and take judicial notice thereof.

The two cases last cited seem to fairly state the law, both upon principle and authority, viz: That courts will

take judicial notice of the character, as to navigability, of the large rivers, because their navigability is *certain* and notorious; but as to the smaller streams, about which there may be uncertainty or question, they will leave the question of navigability to be proved as other disputed facts are proved.

A stream may be nonnavigable from one or more of several causes—an insufficient supply of water, obstructions, etc.—and, except in extreme cases, the sufficiency of these causes to destroy or prevent navigable character must generally be a matter of more or less uncertainty and dependent upon proof—a question of fact, in short, and not one of law.

It would seem also, on principle, that the matters of which a court will, on trial, take notice judicially, without any averment or proof in respect to them, must be such as come collaterally or incidentally into the case, as distinguished from those which constitute one of the issues of fact made or tendered by the pleading. Perhaps there are extreme cases when a court might decide them only as one of the main issues of fact upon which the case depended upon its own judicial knowledge of what the fact was. But upon such a matter as the disputed navigability of a stream, except one of the clearest character, it would seem that the only proper course is to try such an issue according to the regular and accepted mode, viz, by proof. And such appears to be the view taken in 1 Phillips Ev. (4 Am. ed., 618), where it is said:

> The principle upon which certain matters are judicially noticed, without any proof being required

> in respect to them, appears to be partly that they are of such general and public notoriety that every subject of the realm may fairly be presumed to be acquainted with them; and, partly, that the matters so noticed are generally quite collateral to and unconnected with the point in issue, and are of such a kind that there is no risk in dispensing with the strict formal proof.

And in the paragraph above quoted from Underhill on Evidence, 364, it is said:

> The time of courts should not be taken up, nor should the parties to the action be put to needless expense, in taking evidence to prove facts which are merely collateral to the point in issue, and which are within the knowledge of all persons of average education and intelligence.

In support of this is the fact that there is no case, so far as I have found, where the court has, upon its own judicial knowledge alone, decided a material issue of fact made in the case, or where it has thus decided a matter of fact against the uncontradicted averment of a party in his pleading. In the cases referred to in 16 Am. and Eng. Ency. Law, 245, before referred to, where it is stated that "The courts of some States will take judicial notice of the navigability of streams," as well as in the other cases where the same thing has been held, it does not appear that such navigability or unnavigability was either in issue or averred by one of the parties, but while material, the matter arose collaterally and in the absence of averment.

That courts do not and should not generally take judicial notice of the navigability or unnavigability of streams,

except, indeed, the large rivers, is apparent from another consideration. Matters of which judicial notice is taken should not be pleaded or averred. Whatever may be properly averred, may be proved or disproved. But neither is permitted as to matters of judicial cognizance. Therefore, if the character of streams as to navigability or otherwise is generally a matter of judicial notice, it can never be permissible to aver that a stream is or is not navigable, for the court will take notice of what its character is in this respect. And yet, the uniform practice is, and always has been, to aver such fact when it is claimed; which is quite inconsistent with the idea that courts will take judicial notice of it without averment, and will not allow it to be proved or disproved.

Courts take judicial notice of those facts which are of common knowledge, but there is no such basis for the exercise of judicial notice where the fact is vigorously disputed by the parties in the case—where, indeed, the very question (as in this case) is one of the main questions of fact put in issue by the pleadings between the parties.

The only indications of the navigability of the river in this locality which the court could properly take notice of were the acts of Congress of 1882 and 1888, authorizing the construction of a bridge across the river at El Paso. (Rec., pp. 74–76.)

Both these special acts provided that the structures authorized shall not interfere with the free navigation of the river, showing that Congress regarded the river as navigable at El Paso. And if at El Paso, presumably also up as high as the next natural obstruction, which is

at La Joya, 100 miles above Elephant Butte. (Amended bill, p. 18.)

The opinion of this court in *Egan* v. *Hart* (165 U. S., 188) is not inconsistent, but in harmony with the position of the Government in this case.

1. The question as to the navigability of the Bayou Pierre was tried by the State court upon evidence, and not decided upon "judicial notice."

2. The Supreme Court inferentially holds that if the proposed obstruction would interfere with the navigability of the stream below, it would be unlawful; but that the trial court, as a matter of fact, had found it would not so interfere, and its decision on such matter of fact was not to be reviewed.

POINT VI.

The threatened acts of defendants are within the prohibition of the act of 1890 (Appendix, p. 57).

That act declares that the creating of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect to which the United States has jurisdiction is prohibited.

Observe the broad generality of this language.

"Navigable capacity;" that is, the extent to which such waters are able to accommodate navigation, including depth of water, as well as length and width of stream.

"Waters," including rivers, lakes, bays, harbors, etc.

"In respect to which the United States has jurisdiction." Not "over which," or "on which," or "in which," but "in respect to which," thereby including every possible feature of Congressional regulation and control.

POINT VII.

The defendants' proposed action is also forbidden by the act of 1892 (27 Stats., 110; Appendix, p. 58).

Condensed, that act provides, section 3:

> It shall not be lawful to build any * * * dam * * * in any navigable waters of the United States * * * without the permission of the Secretary of War, in any * * * navigable river or other waters of the United States in such manner as shall obstruct or impair navigation, commerce, or anchorage of said water, * * * or in any manner to alter or modify the * * * condition or *capacity of any* * * * *channel* of any navigable water of the United States, unless approved and authorized by the Secretary of War.

POINT VIII.

Irrespective of the statutes of 1890 and 1892, the Federal courts have authority and jurisdiction to restrain by injunction, at the suit of the United States, the threatened injuries which the defendants are preparing to commit to navigable waters.

In *Gilman* v. *Philadelphia* (3 Wall., 713, 724) this court declared:

> The power to regulate commerce comprehends the control for that purpose, *and to the extent necessary*, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and

> free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist, and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes Congress possesses all the powers which existed in the States before the adoption of the National Constitution, and which have always existed in the Parliament in England (p. 586).

Georgetown v. *Canal Co.*, 12 Pet., 91–98; *Mining Co.* v. *South Carolina*, 144 U. S., 550; *In re Debs*, 158 U. S., 564–599:

> We hold that the Government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that, while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is transmitted power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the National Government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce, or the carrying of the mail; that while it may be competent for the Government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist,

or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority (p. 599).

POINT IX.

If the proposed works of the defendants will injuriously affect the navigation of the Rio Grande in its navigable part, it is immaterial that the works are located at a point where it is not navigable.

This proposition seems too self-evident to require argument, although it is negatived by the decision of the court below.

If the law is otherwise; if the United States has power to prevent the destruction of its navigable streams only when the acts of destruction are committed at a point at which the stream is actually navigable, then the Federal Government has not, as it has been supposed to have, full and complete power to preserve and protect navigation for the purpose of interstate and international commerce.

It is immaterial whether an obstruction is placed midway of the channel where vessels pass, or whether the water is turned off from above. The effect is the same in both cases. The crime of murder may be committed by starvation as well as by direct violence.

Even though the Rio Grande is not navigable in New Mexico, it is concededly navigable for many miles along the borders of Texas and Mexico. The treaty of 1848 so recognizes it. The bill alleges that the works of the defendants as proposed will, if constructed, so deplete

and prevent the flow of water through the channel of said river below said dam as to seriously obstruct the navigable capacity of said river throughout its entire course from Elephant Butte to its mouth. (Rec., p. 18, par. 7.) This allegation of injury, as the court heard the case, stood admitted.

Indeed, the court below expressly holds that such fact is immaterial, for the reason that such diversion as the defendants propose to make is not a violation of any law of the United States or of any treaty, if done upon a stream at a point above the head of navigation.

Broadly stated, the decision of the court of New Mexico is that, under the laws of the United States and of that Territory, it is lawful to divert entirely all the water in the Rio Grande River as it flows through New Mexico, and to use it for local purposes; and if thereby the navigability of the stream below is destroyed, still no legal wrong has been committed and no Federal law or treaty violated.

This astounding conclusion is attempted to be sustained by an application of the peculiar law of prior application of running water which prevails in the Pacific States and Territories, and of certain land laws of the United States.

If this were a diversion affecting only the rights of riparian owners upon the stream below in their character of proprietors, then it would be immaterial whether the common law of riparian lands or the peculiar rule of prior appropriation prevails. The Federal Government is not concerned about mere invasions of private right.

The wrong it seeks to prevent is to the public right—the right of navigation and obligation of its treaty.

No proper construction of the riparian laws of the Pacific States, nor any proper interpretation of the land laws and policy of the Federal Government can give any sanction to such a doctrine as is enunciated by the court of New Mexico in this case.

The conflict between the rights of miners and other users of the water of a stream for the special purposes required in the Pacific States, and those interested in the navigability of the stream at a point below, was fully discussed by Judge Sawyer in the very important case of *Woodruff* v. *North Bloomfield Gravel Mining Co.*, 18 Fed. Rep., 753 (1884).

In that case the defendants were engaged in hydraulic mining to a very great extent in the Sierra Nevada Mountains, and were discharging their mining débris, rocks, pebbles, gravel, and sand to a very large amount into the headwaters of the Yuba, a river rising in the Sierra Nevada Mountains, and forming one of the headwaters of the Sacramento River. The débris thus discharged filled up the natural channel of the Yuba above the level of its banks, and also of the Feather, another river into which the Yuba flowed, below the mouth of the Yuba, to a depth of 15 feet or more, lessening and injuring the navigability of both streams. In that case it was expressly claimed on behalf of the defendants that Congress by the act of 1866, and the legislature of California by statutes similar to those of New Mexico, had authorized the use of the navigable waters of the Sacramento and Feather rivers for the flow and deposit of

mining débris, and having so authorized their use, all the acts complained of were lawful, and the results of those acts, therefore, could not be a nuisance, public or otherwise. The same Federal legislation relied upon in this case was cited and relied upon in that case. I make the following citations from the opinion of Judge Sawyer:

> It is not pretended that either Congress or the legislature of California has anywhere in express terms provided that the navigable waters of the State may be so used, but this authority is sought to be inferred from the legislation of both bodies, recognizing mining as a proper and lawful employment, and encouraging this industry, knowing that mining of the kind complained of could only be carried on successfully by discharging the débris into the streams in the mining regions, which must, from the necessity of the case, find its way into the navigable waters of the State. As to Congress, it might be sufficient to say that it has no authority whatever to say what shall or what shall not constitute a nuisance within a State, except so far as it affects the public navigable waters, and interferes with interstate or foreign commerce, or obstructs the carrying of the mails. Under its authority to regulate commerce between the States, and establish post roads, Congress may doubtless declare and punish as such the obstruction of the navigable waters of the State as a nuisance to interstate and foreign commerce, but there its authority ends. The necessary results of the acts complained of clearly constitute a public and private nuisance, both at common law and within the express language of the civil code of California (pp. 770, 771).
>
> Had all these lands on the shed water of the Yuba, or all lands in the State containing mines,

been owned under a Spanish grant by a private party, as was the Merced grant, confirmed to Fremont, the owner of the lands might have made precisely such regulations as to the sale or working of the mines and giving water rights and other easements in his lands as the United States have done by their legislation, and with precisely the same effect. Had such been the case, would counsel for a moment have pretended that by such regulations he intended to subordinate the navigable waters of the State, and the rights of all property holders on the waters of the State below, to the use of his grantees of mines? Yet the inference that he did so intend would be just as legitimate as the inference that Congress so intended by the legislation relied on; and if he so intended, he had just as much power to give effect to his intention as had Congress (pp. 775, 776).

Congress is authorized to "*regulate*," but not to *destroy*, "commerce among the States." It may, undoubtedly, in its wisdom, obstruct, or perhaps destroy, navigation to a limited extent at particular points for the purpose of its general advantage and improvement on a larger general scale, such, for example, as by authorizing the building of a railroad or post-road bridge across a navigable stream, but it can not destroy or authorize the destruction, entire or partial, of the whole system of navigable waters of a State for purposes wholly foreign to commerce or post roads, or to their regulation. If Congress could so authorize, or, as is claimed, has so authorized, the acts complained of as to make them lawful, then it can authorize, and it has authorized, the filling up and utter destruction of all the navigable rivers, streams, and bays of the State, for there is no limit fixed to the amount of débris that

may be sent down; and upon the hypothesis claimed, if such waters are not filled up and destroyed, it is for want of physical capacity to do it, and not because it is unlawful (pp. 778, 779).

Again, so far as any legislation is concerned that would attempt to authorize the filling up of the navigable rivers and bays of the State, to the destruction or material injury of their navigation, it must be void for want of power on other grounds. We have seen that the title to the soil under the navigable waters of the State immediately connected with the ocean, and within the ebb and flow of the tides, is in the State. (*Pollard's Lessee* v. *Hagan*, *supra*.) In the case of fresh water rivers, however, above the ebb and flow of the tides, not in a proprietary sense; in such waters the proprietary right to the soil under the water is, ordinarily, in private parties (*Jones* v. *Soulard*, 24 How., 65; *Smith* v. *City of Rochester*, 92 N. Y., 463; *Chenango Bridge Co.* v. *Paige*, 83 N. Y., 185); but whether in the State in a proprietary sense or not, the title is, nevertheless, in the State, in a governmental sense, as a part of its sovereign domain—a part of its municipal sovereignty—held in trust for all, to protect, preserve, and improve for the purposes of navigation and the benefits of commerce, and not otherwise.

There are two senses in which the rights of the State are to be considered—one proprietary and the other governmental; proprietary as where the State owns an absolute fee in the land in the same manner and sense, with the same rights and powers, as an individual owns his land; and governmental as where the title is held in trust for the use of the public, such as highways, navigable streams, etc. The former is alienable, *the latter inalienable*. If the

> State can be considered as holding a proprietary interest in the soil, under navigable fresh-water rivers, still, the alienation of such proprietary interest would, necessarily, be subject to the *inalienable* sovereign right of the State to control it for the proper public uses and trusts for which it is held in the interest of commerce and of all the people (*Smith* v. *City of Rochester*, 92 N. Y., 477, 478). Says the court, by the chief justice, in that case, citing as authority *Martin* v. *Waddell* (16 Pet., 367): "While a sovereign may convey its proprietary rights, *it can not alienate its control over navigable waters without* abdicating its sovereignty." (Id., 484.) Again, quoting Judge Earl in *Chenango Bridge Co.* v. *Paige* (83 N. Y., 178), the court says: "The legislature, except under the power of eminent domain, upon making compensation, can interfere with such streams only for the purpose of *regulating, preserving, and protecting the public easement. Further than this it has no more power over fresh-water streams than over private property.*" (Id., 485.) If the legislature can not interfere with such streams for purposes other than those mentioned it certainly can not authorize them to be filled up with débris from mines, or otherwise, to the destruction of the public easement—the right of navigation. (pp. 784, 785.)

This case points out, with strong emphasis, that the act of 1866 and acts of 1870 and 1872 relate only to the disposition of public lands of which the Government was proprietor, and that they were never intended to affect the rights of private persons in navigable parts of the streams, or to subordinate the very existence of the navigable waters of the States to the use of private parties above.

The supreme court of California has held to the same effect. (See *People* v. *Gold Run Ditch and Mining Co.*, 66 Cal., 138.) In this case the defendant was a ditch and mining company, running water ditches and mines and working its mines by the hydraulic process. The effect of its work was to discharge into the American river, a navigable stream, large quantities of gravel, sand, and other refuse material. Other mines than those of the defendant were worked by the hydraulic process, and débris from these mines was also deposited in the American River. All of this refuse material was carried down the river by the force of the current and deposited in the Sacramento River, a stream of which the American River is a tributary. The result was to fill the channel of the Sacramento River so as to materially impair navigation. Held, that these acts of the defendant constituted a public nuisance, which might be enjoined in an action instituted by the attorney-general in the name of the people of the State, and that the action could be maintained against the defendant, notwithstanding the fact that other persons were committing similar wrongs, and without joining such other persons who contributed to the injury.

Congress has expressly provided by statute for the regulation of hydraulic mining so as to prevent injury from that cause to navigable waters. See act of March 1, 1893 (27 Stat., 507).

Hydraulic mining is not usually carried on upon navigable parts of streams, but above the point of navigation. Congress, therefore, by this legislation impliedly asserts its authority to prevent any and all acts injurious to navigable streams, no matter where such acts are performed.

POINT X.

The threatened acts of the defendants, by destroying the navigability of the Rio Grande River, will be constructively a violation by the United States of its treaty obligations with Mexico, and the United States is therefore bound to prevent such injuries.

Articles 5 and 7 of the treaty between the United States and Mexico of February 2, 1848, read as follows (9 Stats., 922):

> ARTICLE 5. The boundary line between the two republics shall commence in the Gulf of Mexico, 3 leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one to the point where it strikes the southern boundary of New Mexico; thence westwardly, along the southern boundary of New Mexico (which runs north of the town called *Paso*), to its western termination; thence northwardly, along the western line of New Mexico, until it intersects the first branch of the river Gila (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same); thence down the middle of the said branch and of the said river until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between upper and lower California, to the Pacific Ocean.
>
> ARTICLE 7. The River Gila and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico being, agreeably to the fifth

article, divided in the middle between the two Republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries, and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right, not even for the purpose of favoring new methods of navigation. Nor shall any tax or contribution, under any denomination or title, be levied upon vessels or persons navigating the same, or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making the said rivers navigable or for maintaining them in such state, it should be necessary or advantageous to establish any tax or contribution, this shall not be done without the consent of both Governments.

The stipulations contained in the present article shall not impair the territorial rights of either Republic within its established limits.

By the treaty between Mexico and the United States, known as the Gadsden treaty, of December 30, 1853 (10 Stats., 1034), the following modification of the treaty of 1848 was made:

The several provisions, stipulations, and restrictions contained in the seventh article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Bravo del Norte below the initial of the said boundary provided in the first article of this treaty; that is to say, below the intersection of the 31° 47′ 30″ parallel of latitude, with the boundary line established by the late treaty dividing said river from its mouth upward, according to the fifth article of the treaty of Guadalupe.

The parallel of latitude mentioned in this latter treaty crosses the boundary a short distance below El Paso.

The Rio Grande, therefore, along what is practically the whole boundary between Texas and Mexico is made free for the common navigation of the vessels and citizens of both countries, and it is expressly stipulated that neither country shall, without the consent of the other, construct any work that may impair or interrupt, in whole or in part, the exercise of this right, not even for the purpose of favoring new methods of navigation.

The court below seemed to think that this covenant was limited to the construction of works in the navigable part of the stream. To hold that this is the limit of the obligation would seem to come short of a reasonable and just interpretation of international duty.

The court below, admitting that navigation was to be common to the citizens of both countries, declared that it was not a consequence of this declaration that the United States was bound to preserve or contribute the water to make navigation possible. The right to the use of a thing carries with it the right to all such accessories as are necessary to maintain the thing used.

It is submitted, whether the United States ought, in honor and good faith, to accept any such interpretation of its treaty obligations as is made by the supreme court of New Mexico. The United States is bound, in good faith, to see that no act of its citizens, no matter where performed or under what pretext, shall destroy the substantial right reserved by the treaty for the use of the citizens of Mexico.

The right of navigation of rivers flowing through different sovereignties, like the Rhine, the St. Lawrence, and the Mississippi prior to the Louisiana purchase, has been one of the great topics of argument in international law. It is unnecessary here to discuss the extent of such right as a principle of that branch of jurisprudence. The right in this instance is expressly defined and created by treaty obligation between the United States and Mexico.

Even in the absence of a treaty it would never be asserted by anyone, and no basis for the declaration of such a doctrine can be found in any of the writers upon international law, that the Government through whose territory the upper part of a navigable river runs could turn the channel of the river into a different course and prevent its natural flow through the territory of a neighboring power below. Yet that is practically the right which is asserted by the decision of the court of New Mexico in this case.

In this connection, the reasons advanced on behalf of the United States in support of their claim of a right to navigate the St. Lawrence River to and from the sea, in the controversy which took place between this Government and Great Britain in 1826, are interesting and important.

This right was rested on grounds of natural right and obvious necessity existing independently of any treaty regulations. (Lawrence's Wheaton on International Law, edition of 1863, p. 356.)

The principle upon which the right of the United States was asserted was that the right to a thing gives a right to the means without which it could not be used—

that is to say, that the means follow the end; and it was declared that this principle was founded in natural reason, was evidenced by the common sense of mankind, and declared by writers on international law. (Lawrence's Wheaton, p. 355.)

Does not the proper application of this principle require its application to this case as forbidding this country to injure, by internal acts committed above the point of navigability, the rights and privileges of navigation of a neighboring nation in the parts of the stream which are navigable and common to both countries?

I do not wish to be understood as implying that this Government is under any restrictions as to uses of the water which do not injure navigation. It is only in respect to navigation that the use of the river is made common.

POINT XI.

The relative importance of the navigation of the Rio Grande and the irrigation of arid lands in New Mexico can not be taken into consideration in determining the questions in this case.

The supreme court of New Mexico, in its opinion, by several expressions seemed to imply that it had a right to balance advantages and inconsistencies, and to decide the question of the relative importance of the right of navigation and the privilege of irrigation. On page 6 of the opinion, the court said:

> Here the paramount interest is not the navigation of the streams, but the cultivation of the soil by means of irrigation. Even if, by the expenditure

of vast sums of money in straightening and deepening the channels, the uncertain and irregular streams of this arid region could be rendered to a limited extent navigable, no important public purpose would be subserved by it. Ample facilities for transportation, adequate to all the requirements of commerce, are furnished by the railroads, with which these comparatively insignificant streams could not compete. But, on the other hand, the use of the waters of all these streams for irrigation is a matter of the highest necessity to the people inhabiting this region, and if such use were denied them, it would injuriously affect their business and prosperity to an extent that would be an immeasurable public calamity.

On page 9 the court further said:

From the foregoing discussion of the legislation of Congress and the conditions prevailing in the region under consideration, it would seem to follow that if there were a conflict between the interests of navigation and agriculture in relation to a stream like the Rio Grande that of the latter would prevail. Certainly it should be held to be under the protection of the courts against any doubtful interpretation or application of a penal statute. If the waters of the Rio Grande are not navigable in New Mexico, which we hold to be the case, then they can not be said to be waters in respect of which the United States has jurisdiction. And certainly, in the absence of some express declaration to that effect, it can not be supposed that Congress intended to strike down and destroy the most important resource of this vast region in order to promote the insignificant and questionable benefit of the navigation of the Rio Grande for a short distance above its mouth.

Again, on page 9, the court said:

> And in view of the condition and history of the region which would be affected, the unimportance of the Rio Grande as a waterway for commercial intercourse at any point, its nonnavigability at the place of the proposed construction and for hundreds of miles below, and the evident purpose of Congress, by its legislation, to promote irrigation throughout this portion of the country, even to the extent of further obstruction of this very stream, it would, in our opinion, be unreasonable to hold that legislation which has a definite and well-understood purpose in furtherance of the public interest in those portions of the country to whose conditions it is applicable was intended to operate to the detriment of the public interests in regions to whose conditions it is not applicable and where its enforcement would be destructive of the very interests which the legislation of Congress has otherwise undertaken to promote.

This view ought not to be entertained or countenanced by the United States Government. If the right of navigation exists and is useful for purposes of interstate or international commerce, then neither the United States nor any State has the power to destroy it because some other interest, not relating to commerce, will be thereby benefited. The primary use of waters is for navigation. Their use for rendering valuable tracts of arid land which heretofore have always been valueless must be conditioned upon not interfering injuriously with the rights of navigation.

It is submitted that the decree of the court of New Mexico was erroneous; that the order dismissing the bill

of complaint should be reversed, and the temporary injunction which was dissolved by the court should be restored.

If the court shall take the view herein advocated, that it is, for the purposes of this case, immaterial whether the Rio Grande at Elephant Butte is navigable or not, provided the works of the defendants will injuriously affect navigation below, then the cause should be remanded for the purpose of trying the single issue made by the answer, as to whether or not the proposed works will injuriously affect navigation.

JOHN W. GRIGGS,
Attorney-General.

APPENDIX.

RIVER AND HARBOR BILL OF SEPTEMBER 19, 1890 (26 STATS., 454, SEC. 10).

That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense, and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court; the creating or continuing of any unlawful obstruction in this act mentioned may be prevented, and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

RIVER AND HARBOR ACT OF JULY 13, 1892 (27 STAT., 110, SEC. 3).

That section 7 of the river and harbor act of September nineteenth, eighteen hundred and ninety, be amended and reenacted so as to read as follows:

"SEC. 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, harbor of refuge or enclosure, within the limits of any breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War:

"*Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers and abutments, the construction of which has been heretofore duly authorized by law, or to be so construed as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works under an act of the legislature

of any State, over or in any stream, port, roadstead, haven, or harbor, or other navigable water not wholly within the limits of such State."

AN ACT GRANTING THE RIGHT OF WAY TO DITCH AND CANAL OWNERS OVER THE PUBLIC LANDS, AND FOR OTHER PURPOSES, APPROVED JULY 26, 1866 (14 STATS., 251, SEC. 9).

And be it further enacted, That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however*, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

This section is now numbered 2339 of the Revised Statutes.

Articles 5 and 7 of the treaty between the United States and Mexico, of February 2, 1848, read as follows (9 Stat., 922):

ARTICLE 5. The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where

it has more than one, to the point where it strikes the southern boundary of New Mexico; thence westwardly along the southern boundary of New Mexico (which runs north of the town called *Paso*) to its western termination; thence northwardly along the western line of New Mexico until it intersects the first branch of the River Gila (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch and thence in a direct line to the same); thence down the middle of the said branch and of the said river until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

ARTICLE 7. The river Gila and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico, being, agreeably to the fifth article, divided in the middle between the two Republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries, and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right, not even for the purpose of favoring new methods of navigation. Nor shall any tax or contribution, under any denomination or title, be levied upon vessels, or persons navigating the same, or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making the said rivers navigable or for maintaining them in such state, it should be necessary or advantageous to establish any tax or contribution, this shall not be done without the consent of both Governments.

The stipulations contained in the present article shall not impair the territorial rights of either Republic within its established limits.

By the treaty between Mexico and the United States, known as the Gadsden treaty, of December 30, 1853 (10 Stat., 1034), the following modification of the treaty of 1848 was made:

The several provisions, stipulations, and restrictions contained in the seventh article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Bravo del Norte below the initial of the said boundary provided in the first article of this treaty—that is to say, below the intersection of the 31° 47′ 30″ parallel of latitude with the boundary line established by the late treaty, dividing said river from its mouth upward according to the fifth article of the treaty of Guadalupe.

Act of March 3, 1877 (19 Stats., 377; Sup., 2d ed., 137), an act providing for the sale of desert lands. In a proviso to the first section it is enacted:

The water of all lakes, rivers, and other sources of water supply upon the public lands, and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation.

A joint resolution of March 20, 1888 (25 Stat., 618), provides for the selection by the Geological Survey of reservoir sites for surplus water, and directs a report to be made upon the same to Congress.

In the sundry civil appropriation act of October 2, 1888 (25 Stat., 526), provision is made for the survey and reservation of reservoir sites in an appropriation of $100,000 for that purpose.

In the sundry civil appropriation act of March 2, 1889 (25 Stat., 960), an appropriation of $250,000 for the survey of reservoirs and canals was made.

The act of March 3, 1891 (26 Stat., 1101), sections 17, 18, 19, 20, and 21, provides a system of procedure for procuring right of way for reservoirs and canals.

The act of January 21, 1895 (28 Stat., 635), authorizes the use of public lands for reservoirs and canals, etc.

The act of January 13, 1897 (29 Stat., 484), provides for reservoirs on public lands by persons or corporations engaged in breeding stock, etc.

The act of February 26, 1897 (29 Stat., 599), is as follows:

AN ACT to provide for the use and occupation of reservoir sites reserved.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That all reservoir sites reserved or to be reserved shall be open to use and occupation under the right of way act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That the charges for water coming in whole or in part from reservoir sites used or occupied under the provisions of this act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or in part situate.